

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

FEB 7 - 1921

Henry W. Hodges
Black

In the Court of Appeals
OF THE DISTRICT OF COLUMBIA

No. 3499.

728

J. DAN BLACKISTONE, APPELLANT,
vs.
LEONARD W. GROOMES, APPELLEE.

Motion to Dismiss and Statement to Accom-
pany Motion.

JOSEPH D. SULLIVAN,
Attorney for Appellee.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 3499.

J. DAN BLACKISTONE, APPELLANT,

vs.

LEONARD W. GROOMES, APPELLEE.

MOTION TO DISMISS.

Now comes the appellee in the above entitled cause, by Joseph D. Sullivan his attorney, and moves the court to dismiss the appeal herein, and for grounds says: That the appeal is from a judgment entered against the defendant by default for failure to file an affidavit of defense as required by Rule 19 of the rules of the Supreme Court of the District of Columbia, said judgment being entered on the thirteenth day after service of the affidavit of merit of the plaintiff Leonard W. Groomes upon the defendant J. Dan Blackistone, and that no appeal lies from such judgment.

Now comes the appellee in the above entitled cause, by Joseph D. Sullivan, his attorney, and moves the court to affirm the judgment in the above entitled cause, upon the ground that it is manifest the appeal was taken for delay only and upon the further ground that the question for which review is sought is so manifestly frivolous as not to require further argument.

JOSEPH D. SULLIVAN,

Attorney for Appellee.

In the Court of Appeals

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No. 3499.

J. DAN BLACKISTONE, APPELLANT,

vs.

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Statement to Accompany Motion to Dismiss.

The appellee was granted a judgment in the Municipal Court for possession of the premises sued for. An appeal was taken to the Supreme Court of the District of Columbia. There the appellee filed an affidavit of merit in accordance with Rule 19 of the rules of court, and a copy of said affidavit was served upon the defendant, the appellant herein, on the 15th day of November, 1920. The appellant had ten days from that day in which to file an affidavit of defense. Those ten days expired on Friday, November 26th. No affidavit was filed by the defendant, and on Tuesday, November 30th, the court awarded a default judgment against the defendant. On the same day the defendant, Blackistone, filed an affidavit of defense, which however was not served on the appellee, or his counsel. This affidavit sets up no valid defense to the action. It will be found on record page 7. Subsequently, on December 2d, defendant, through other counsel, filed a motion to set aside the judgment by default, and supported it with an affidavit. This affidavit is found in the record on page 11, but contains nothing which if true would be a bar to the plaintiff's right of possession. The motion to set aside the judgment was overruled and

the appeal has been taken to this court. The record consists of sixteen typewritten pages. The defendant has allowed thirty-nine days to elapse before docketing the case in this court. The defense set up in his affidavit of defense is the provisions of the Ball Act heretofore held unconstitutional by this court. There being nothing before the lower court for its decision, except the default of the defendant, there were no points or questions of law decided by the court below, and there is no point of law before this court on this appeal notwithstanding the elaborate assignment of alleged errors.

There is an innuendo that the affidavit of defense filed November 30th, was filed before the judgment was obtained; but the affidavit of the defendant does not state this to be a fact, and if such was the fact, he would have advised the court positively on the point. Not only does he not do so, but he offers no serious excuse for his failure to file the affidavit within the ten days allowed him, or the two extra days given him by the generosity of the plaintiff in not entering judgment until the thirteenth day after service of the affidavit of merit.

The presumption attaching to the regularity of the actions of the court will attach in this case, and it will be presumed that the affidavit of defense filed the same day that the default judgment was taken was not filed until after the judgment had been awarded. *L. & T. Wooldridge vs. A. & Wm. A. Brown*, 1 Tex., 478. In such a case, fractions of a day will be considered by the court in ascertaining whether the default or the answer was first entered. *Bank vs. Restein*, 214 Pa., 30; 35 Pa. Sup. Ct., 47. The failure of the appellant to show the time when his affidavit was filed, is an admission that it was not filed until after the judgment by default was entered. The judgment was therefore correctly entered and no appeal lies from such a judgment.

JOSEPH D. SULLIVAN,
Attorney for Appellee.

